

interfere with the findings of facts by the court below. It is true that appellate courts are usually slow in disturbing findings of facts made by the trial judge, but I can find no rule which restricts my function here only to that of a judge of law and not of facts. It is the duty of the court on appeal to review all evidence presented before the lower court and, if it feels that certain material facts have been missed or improperly considered by the presiding President or Magistrate, then it should not hesitate from performing its duty as a judge of facts to consider and weigh those facts and decide whether those facts could have altered their judgment in one way or another.

The entire defence of the respondent had been placed before the learned President, who accepted it as probable solely on the basis of reasonable explanation on his incriminating conduct given by the respondent himself. The defence, as had been fully presented, was founded wholly on this explanation, which the learned President considered had negated the respondent's *mens rea*. But he had so found because of his omission and misappreciation of material facts. Had he taken the overwhelming facts and inferences, which I have dealt with earlier, into consideration and applied his proper reasoning, I am certain that he, as any reasonable President, would have found that the respondent had failed to refute or negate or even raise any reasonable doubt as to the existence of his proven intention to misappropriate.

As the respondent's defence lies squarely on the acceptance or rejection of facts relating to his intention, I do not see any other defence being open to him meriting further consideration of his case by the learned President. Accordingly I would revise the learned President's findings, set aside the order of acquittal made by him in respect of the 3rd charge, find the respondent guilty of the offence as charged and substitute the order of acquittal with that of conviction.

Sentence: (To the respondent).

I find it most disquieting to punish you. You are a complete stranger to me but not to the profession to which you belong. Men of whatever professional standing owe their success to the educational heritage from their past teachers. People of your profession are reputed for their proficiency and probity. They are people who would willingly forgo the glamour and gains of a more lucrative office in order to dedicate their lives towards the educational and moral upbringing of our children. Even for the very enlightened and the aged, the vision and image of his past teachers must necessarily be one of respect, reverence and venerate adoration. Now the nation has entrusted on people like you the arduous and delicate duty of shaping the destiny of our future generation. You are considered to be the exemplar of cultural virtues and as such your minutest actions and deportment will attract immediate imitation from your pupils. It is imperative, therefore, that you maintain the highest quality of ethics, in particular, honesty and respect of the law. But, unfortunately, you have transgressed both by your fraudulent acts. You managed to pull the wool over the eyes of the Chairman and the entire members of the Board of the

school with unbelievable ease and they, in turn, yielded to your despicable design out of their sure and probably blissful ignorance. You then proceeded to plunder the funds entrusted to you with no apparent compunction — all for the price of the instalments of your wife's second-hand car.

Section 409 of the Penal Code, the section under which you have been convicted, prescribes a very heavy punishment. But that alone should not form the sole yardstick for your punishment. This court will take all mitigating factors into consideration so that the punishment imposed will be neither harsh nor excessive. Your counsel has devoted a bigger part of his mitigation plea on your past character and your contribution to society. I have taken notice of them. But I also have a public duty to perform and that duty necessitates the imposition of punishment on you. Although that punishment will neither reflect your counsel's hope nor the wish of the learned Deputy, it is something I consider fair in the circumstances.

You have disgraced both yourself and your profession. As a result, you will, no doubt, lose your position, your calling and, above all, the respect which you have commanded as a headmaster. The job of a master, teacher and adviser to our future generation is indeed an honourable one and you have lost it by merely, as the records speak, through your inability to cut your coat according to your cloth. It is distressing to note that a single act of dishonesty had demolished a respectable profession which had taken the best years of your life to build. The loss of your job and the humiliation suffered by this conviction are by themselves a substantial part of your punishment.

I sentence you to a day's imprisonment and a fine of \$2,500, in default, 5 months' imprisonment.

Appeal as regards 3rd charge allowed.

Solicitors: *Joseph & Son.*

RE DATUK HARUN BIN HAJI IDRIS*

[O.Cr.J. (Hashim Yeop A. Sani J.) November 18 & 22, 1980]
[Kuala Lumpur — Federal Territory Criminal Application
No. 16 of 1980]

Administrative Law — Habeas Corpus — Sentences of High Court — Confirmed and varied by Federal Court — Whether sentences concurrent or consecutive — Power of Superior Court to alter or review judgment — Warrant of Commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278, 282, 292.

Criminal Law and Procedure — Accused sentenced in respect of two cases — Whether sentences concurrent or consecutive — Power of court to alter or review judgment — Warrant of Commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278, 282 & 292.

In this case the applicant had been convicted on three charges under the Prevention of Corruption Act, 1961 and sentenced to one year imprisonment on the first charge and two years' imprisonment on the second and third charges, the sentences to run concurrently. These sentences were confirmed on appeal. Subsequently the applicant was again convicted on two charges under the Penal Code and was sentenced to six months' imprisonment on the first charge and fined \$15,000 on the second charge. On appeal the Federal

* On appeal by the applicant, the Federal Court reserved judgment on January 21, 1981.

Court enhanced the prison sentence on the first charge to four years and imposed a sentence of three years on the second charge, the sentences to run concurrently. After applications to appeal to the Yang di-Pertuan Agong had been refused, the applicant commenced his prison sentence on March 1, 1978. At that time a warrant of commitment was issued in respect of the second case which was silent on whether the sentences passed on the applicant were concurrent or consecutive to the sentences in the earlier case. Subsequently on August 29, 1979 a second warrant of commitment was issued and back-dated to February 28, 1978 with the addition of the words 'but these sentences to commence on the expiration of the sentence imposed' in the first case. The applicant applied for an order of *habeas corpus* claiming that he had been illegally confined in prison from October 29, 1980 as he had already completed serving his prison sentences as on that date, assuming the sentences in the two cases were concurrent.

Held: (1) the trend of decisions in all the Commonwealth jurisdictions would seem to be that if it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for a writ of *habeas corpus*;

(2) a superior court as a court of record has an inherent jurisdiction to remedy mistakes in its records;

(3) in this case the subsequent warrant of committal merely altered in form the first warrant of committal in so far as the latter failed or omitted to describe the actual decision of the Federal Court;

(4) the alteration made in the subsequent order and warrant was a rectification made solely to conform with the decision of the Federal Court made in the proper exercise of its discretion.

Cases referred to:-

- (1) *Carus Wilson's Case*, *The Law of Habeas Corpus* by R.J. Sharpe, 1976 Ed.
- (2) *Gurdit Singh's Case* [1933] M.L.J. 224.
- (3) *Rex v. Governor of Lewes Prison* [1917] 2 K.B. 254.
- (4) *Re Francis Robert Newton* 16 C.B. 97.
- (5) *Re Albert Casey* [1932] C.C.A. 193.
- (6) *A.S. Naidu v. State of Madhya Pradesh* [1975] Cr. L.J. 498, 499.
- (7) *Reg. v. Michael* [1976] 1 Q.B. 414, 418.
- (8) *In re Swire* (1885) 30 Ch. D. 239.
- (9) *Milson v. Carter* [1893] A.C. 638.
- (10) *R. v. Saville* [1980] 1 All E.R. 861.
- (11) *Chua Han Mow v. Superintendent of Pudu Prison* [1980] 1 M.L.J. 219, 220.

CRIMINAL APPLICATION.

Marina Yusoff (Syed Ibrahim with her) for the applicant.

Datuk Abu Talib bin Othman, Attorney-General (Lim Beng Choon with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: The applicant for *habeas corpus*, Datuk Harun bin Haji Idris, claims that he has been illegally confined in Pudu Prison from October 29, 1980 onwards because according to him, he had in law already completed serving his prison sentences as on October 28, 1980. The claim is based on the ground as reflected in the prayer in the Notice of Motion which also asks for a declaration that the second Warrant of Committal issued by the Deputy Registrar is invalid and bad in law.

To understand the issues raised more clearly, it is necessary to set out briefly the background facts. On May 18, 1976 the applicant was convicted on three

- charges under the Corruption Act, 1961 and was sentenced to one year imprisonment on the first charge and two years' imprisonment on the second and third charges, the sentences order to run concurrently and to pay to UMNO, Selangor the sum of \$225,000. On January 24, 1977 he was again convicted on two charges under the Penal Code and was sentenced to six months' imprisonment on the first charge and fined \$15,000 on the second charge. In both cases he appealed to the Federal Court — vide Federal Court Criminal Appeals No. 19 of 1976 and No. 11 of 1977. His appeal in the first case was dismissed and the sentences confirmed except that the Federal Court varied the order on the sum of \$250,000 in that it was to be paid to the Federal Government as fine. In the second appeal the Federal Court enhanced the prison sentence from six months to four years on the first charge and instead of the fine of \$15,000 imposed three years' imprisonment on the second charge but ordered that the sentences to run concurrently. It must be noted firstly that these appeals were heard separately and on different dates. Secondly, it is to be noted also that the words "concurrently" used in connection with the two cases denote concurrent effect in each of the two cases and not between the cases.

- Following the disposal of both the appeals and the leave to appeal to the Yang di-Pertuan Agong the Chief Registrar issued two warrants of committal, one for each case both dated February 28, 1978 in respect of the two cases viz. Federal Territory Criminal Trial No. 2 of 1976 and Federal Territory Criminal Trial Nos. 40, 41 and 43 of 1976. There were some problems in the apprehension of the applicant after his leave to appeal to the Yang di-Pertuan Agong was refused but these facts are not really relevant for our present purpose. In any case the applicant commenced his prison sentence on March 1, 1978. About one and half years later on August 29, 1979 a second warrant of committal in respect of Federal Territory Criminal Trial Nos. 40, 41 and 43 of 1976 was issued by the Deputy Registrar backdated to February 28, 1978 with the addition of the words "but these sentences to commence on the expiration of the sentence imposed on him in Federal Territory Criminal Trial No. 2 of 1976 and affirmed in Federal Court Criminal Appeal No. 19 of 1976."

The applicant contends that —

- (1) the second warrant of committal issued on August 29, 1979 backdated to February 28, 1978 was invalid as it purported to add words which had the effect of altering the sentences on him;
- (2) sentences of imprisonment run from the time they are imposed or from the date of dismissal of such appeal unless the court otherwise directs;
- (3) the court cannot alter its record where the record is regular and clear on the face of it and there has been no obvious mistake which might lead to a miscarriage of justice and certainly cannot alter the sentence adverse to him in his absence;
- (4) the second warrant of committal issued by the Deputy Registrar is invalid being contrary to section 285 of the Criminal Procedure Code.

The last contention was however abandoned during the argument.

The warrant of committal issued by the Chief Registrar dated February 28, 1978 in respect of Federal Territory Criminal Trial Nos. 40, 41 and 43 of 1976 was silent on whether the sentences passed on the applicant were concurrent or consecutive to the earlier sentences and therefore it was argued that all these sentences should be construed to be concurrent by virtue of section 282(d) of the Criminal Procedure Code (F.M.S. Cap. 6).

I wish to make it clear at the outset that the issues raised are not new or novel. They have been raised before in this and other jurisdictions. Shorn of all the rhetorics the issues are only concerned with the extent of the powers of a superior court to review and rectify its own records. This power is reflected in section 278 of our Criminal Procedure Code which reads as follows:—

"278. No court, other than a High Court, having once recorded its judgment, shall alter or review the same: provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the court rises for the day."

This section can also be properly interpreted to mean that the superior courts can go beyond rectifying clerical errors and other mistakes. But the question is to what extent? This is what we have to examine.

First, the nature of the application. This is an application for *habeas corpus* by a convicted person serving a sentence of imprisonment imposed by a superior court of competent jurisdiction. In practice it would appear that the courts have never allowed *habeas corpus* to be used as a means of reviewing the decisions of superior courts. This attitude is expressed in the statement of Denman L.J. in *Carus Wilson's case*⁽¹⁾ that there is an "exception that runs through the whole law of *habeas corpus*", whether under common law or statute, namely, "our form of writ does not apply where a party is in execution under the judgment of a competent court." This attitude is probably based on two assumptions, (1) it is always presumed that the court has acted regularly and in no case has the record of the proceedings been impeached on *habeas corpus*; and (2) *habeas corpus* has always been linked in the minds of judges of the common law with *certiorari* and the jurisdictional basis for review and because review means supervision by a superior court of a court or tribunal subordinate to it, this process cannot therefore be used as a vehicle to review decisions of the superior court. Based on this attitude or approach there have been numerous cases in English and other jurisdictions which say that *habeas corpus* will not be issued where the applicant is detained under authority of an order of the Supreme Court. In our local jurisdiction this proposition was examined half a century ago. For simplicity I reproduce below the judgment of Elphinstone C.J. in *Gurdit Singh's case*,⁽²⁾ an old local authority which dealt with the subject admirably.

"In *Ex parte Lees*, E1.B1. and E1.828, where an application was made to the Court of the King's Bench for a writ of *habeas corpus* for the purpose of quashing the conviction of the applicant by the Supreme Court of St. Helena, Lord Campbell, C.J., said:—

'A writ of *habeas corpus* to the expediency of granting which we have also directed our attention, is not grantable in general, where the party is in execution on a criminal charge, after judgment, or an indictment according to the course of the Common law.'

This general statement by Lord Campbell was approved by Justice Avory in the case of *Rex v. Governor of Lewes Prison*⁽³⁾ which was an application for a writ of *habeas corpus* to test the legality of the conviction and the sentence of a field general court martial. The application was refused on the merits. But Avory J., said:—

'I only wish to add in case these proceedings should be regarded as an encouragement to persons who have been convicted of indictable offences to apply for writs of *habeas corpus* that Lord Campbell C.J., said in *Ex parte Lees* that 'a writ of *habeas corpus* to the expediency of granting which we have also directed our attention, is not grantable in general, where the party is in execution on a criminal charge, after judgment, or an indictment according to the course of common law.' In my judgment that principle applies where a person has been convicted by a duly constituted court martial proceedings of which have been in due course confirmed by the competent authority.'

If that doctrine applies to the conviction by the court martial, it must, I think, also apply to an order by a judge at the Supreme Court."

Since then the trend of decisions in all the Commonwealth jurisdictions would seem to be that if it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be sufficient answer to an application for a writ of *habeas corpus*. It is sufficient for the officer having the applicant in his custody to return to the writ of *habeas corpus* that a court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence.

The rationale behind this judicial attitude or approach (or what we can even call judicial policy) is in my view to give some sense of finality to a judicial process. This rationale is, I think, reflected in a short passage in the judgment of Jervis C.J. in *Re Francis Robert Newton*.⁽⁴⁾ In that case the prisoner was convicted at the Central Criminal Court and an application was made for a writ of *habeas corpus* on the ground that the offence charged was committed in a place outside the jurisdiction of that court. The court refused the application holding that the prisoner's remedy was to proceed by writ of error. Jervis C.J., said:—

"Failing that remedy, the party cannot question the truth of the record upon a *habeas corpus*. This does not leave the party wholly without redress; he may obtain it from the prerogative of the Crown. He may make application to the Secretary of State. . . I am clearly of opinion that this application is as groundless as it is unprecedented."

The issue here is thus narrowed down to the question whether the subsequent order and the subsequent warrant of committal, because of the added words, became invalid. For this, we have first to see the character of the alteration.

It is contended on behalf of the applicant that a sentence is material part of the trial and may not be passed in the absence of the prisoner relying on sections 273 and 278 of our Criminal Procedure Code and on *Albert Casey*.⁽⁵⁾ In that case the prisoner was sentenced to three years' penal servitude and subsequently the sentence was altered to one of two years' imprisonment with hard labour and the Chairman of Quarter Sessions instructed the clerk to make the necessary alteration in the record which was accordingly made. On appeal it was held that the original sentence must be regarded as the sentence actually passed and the alteration was bad. But is that the character of the alteration in the present case?

Our section 292(i) of the Criminal Procedure Code reads as follows:—

"292(i) When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct. A sentence of death shall be executed notwithstanding the pendency of any sentence of imprisonment."

Section 397(1) of the Indian Criminal Procedure Code reads as follows:—

"397.(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence." (proviso omitted).

Despite the different emphasis given with regard to the effect of subsequent sentences the discretion given to the court is the same in both subsections. Subsection (1) of section 397 of the Indian Criminal Procedure Code came to be examined in *A.S. Naidu v. The State of Madhya Pradesh*⁽⁶⁾ (which was a reference to a Full Bench) and the basic point for consideration was whether the direction to make the sentences to run concurrently under the subsection involves a review of the judgment. It was held that a judgment in a criminal case consists of two important elements: a finding on the charge and, in the case of conviction, the nature and quantum of sentence. It was also held that the exercise of the power under that subsection *does not in any way modify or alter the judgment* in the case in which the subsequent sentence has been awarded, inasmuch as it does not affect the nature or quantum of sentence. It is a power pertaining to the *manner of execution of the subsequent sentence* rather than the award of appropriate sentence according to law. Therefore, the direction to make the sentence awarded in a subsequent case to run concurrently with the sentence awarded in a case decided earlier *does not amount to review of the judgment in which the subsequent sentence is passed*. (emphasis mine). The court in that case also held that this power can be exercised even at a later stage, being an independent power conferred by that subsection not involving any review of the judgment on merits. Thus *Albert Casey* is distinguishable not only by its proceeding (it was an appeal) but also by the nature of the alteration of sentence.

It is clear from the affidavit of the Deputy Registrar that the subsequent order and the subsequent warrant of committal merely carried the intention of the Federal Court as expressed in paragraph 10 of the affidavit. The Federal Court in fact had rectified the order with express direction to the Deputy Registrar to rectify the warrant of committal — see paragraph 11 of the affidavit. Looking at the affidavit of the Deputy Registrar and the two orders and the two warrants of committal it is clear to my mind that the alteration made in the subsequent order and warrant was a rectification made solely to conform with the decision of the Federal Court made in the proper exercise of its discretion.

How wide are the powers of the superior court to rectify its orders was also a question dealt with in

Reg. v. Michael.⁽⁷⁾ It was held in that case that quite apart from the power to alter or recall an order before it has been perfected by entry, all the authorities show that the court has an inherent jurisdiction to amend or rectify any order recorded in its record to make such record accord with the order intended by the court. In *In re Swire*⁽⁸⁾ the Court of Appeal recognised that it has such an inherent jurisdiction over its own orders.

The principle reviewed and adopted in *Reg. v. Michael* is that the superior court as a court of record has an inherent jurisdiction to remedy mistakes in its record. Mistakes in the record which can be rectified would seem to include accidental omission. Thus in *Milson v. Carter*⁽⁹⁾ the Supreme Court of New South Wales in granting leave to appeal to the Privy Council had omitted, when dealing with the costs of the appeal, any provision for those costs if the appeal should be struck out for want of prosecution, as in fact happened. Lord Hobhouse, in delivering the opinion of their Lordships, seemed to have no doubt that the Supreme Court could correct such accidental omission. The judgment in *Reg. v. Michael*, *supra*, was approved, adopted and applied in *R. v. Saville*.⁽¹⁰⁾

Our Federal Court also considered other authorities on the power of the courts to issue fresh committal warrants to replace defective ones in *Chua Han Mow v. Superintendent of Pudu Prison*,⁽¹¹⁾ quite recently. That was an appeal against the order of the learned judge of the High Court who held that although the first committal orders were erroneous they could be cured by the simple expedient of directing the committal courts to issue fresh committal warrants in proper form. In conformity with the authorities already established Raja Azlan Shah C.J. said, at page 220:

"It is established law that a warrant of commitment erroneous in form, even where such error makes it invalid as an authority in law for the detention of a prisoner, can be cured by the issue of a subsequently validly drawn warrant by the competent authority, and that such warrant justifies the continuance in prison of a person who, before the issue of such warrant, may have been held in custody without lawful authority."

After examining the authorities the Chief Justice concluded that:

"In the face of that formidable array of authority we are satisfied that the fresh committal warrants which were in proper form, issued by the same committal courts following the committal orders before the hearing of the present appeal are a good and sufficient answer to the application for writs of *habeas corpus*."

In my view the philosophy and principle in *Chua Han Mow v. Superintendent of Pudu Prison* and certainly in *Milson v. Carter* and *Reg. v. Michael* can equally be applied to the facts of the present case because in the final analysis the subsequent warrant of committal referred to here merely altered in form the first warrant of committal in so far as the latter failed or omitted to describe the actual decision of the Federal Court.

Based on the foregoing the application is dismissed. Declaration refused.

Application dismissed.

Solicitors: Marina Yusoff & Co.